STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2011
v	No. 293284 Wayne Circuit Court
VAUGHN MITCHELL, Defendant-Appellant.	LC No. 08-013700-FC

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant Vaughn Mitchell was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), carjacking, MCL 750.529a(1), and possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced to life imprisonment for each murder conviction and a concurrent 15- to 25-year prison term for the carjacking conviction, to be served consecutive to a two-year prison term for the felony-firearm conviction. He appeals as of right. We remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Defendant's convictions arose out of the June 21, 2008, shooting death of Michael Jorden during an apparent dispute over a gun and associated carjacking. Defendant was tried jointly with his father, codefendant Vaughn Brown, before separate juries. Brown was not a part of defendant's life growing up, and they had a strained relationship. They had reconnected a few years before the shooting.

At the joint trial, Ellis Odum testified that he lived across the street from defendant. On the evening of the shooting, Odum saw several young people socializing on the street, including the victim and defendant. Brown was sitting in his van, which was parked on the street. Brown's brother testified that the rear window of the van was darkly tinted and one could not see through it at night. Odum testified that later that night, when he went inside his house, he heard approximately six gunshots. When it became quiet, Odum went outside and saw someone "moving from the field [vacant lot] and coming down toward the street light." Odum eventually recognized the person as defendant. In defendant's hand was a .32 or .38 short-barrel revolver, which he then placed in his pocket. When Odum asked him what was going on, defendant said,

"sh-h-h, it's me." Defendant then crossed the street and entered the passenger side of Brown's van. Odum continued:

> Upon getting into the passenger side of his father's vehicle, I'm watching, then I conversate, he pulls up to in front of my house, no headlights. Upon pulling up in front of my house, I can hear—we both heard—you can hear noise coming from the left. At that point in time, they cut out their headlights. I look, you can see the [victim's] body, like, near the curb, you see him coming toward the curb. He pulled right to him, to the side of him, and he reached out of the driver's side and shot him about 5 times.

Odum explained that Brown was in the driver's seat and defendant was in the passenger seat. The driver's side of the van pulled up alongside the victim's body, which was on Odum's side of the street. Odum believed that Brown reached out of the van and shot the victim. He could not determine the type of gun in Brown's hand. After "firing shots into him, they went to go speed off, and they got to the corner, and he stopped, and [defendant] got out, he ran back to his body." Defendant had a gun. He looked around, took the contents of the victim's pockets, "ran across the street and jumped and got into the [victim's] vehicle and drove off in the vehicle."

Odum testified that he was aware the victim owned a revolver like the one he saw in defendant's hand. Approximately a week before the shooting, defendant had the victim's gun and showed it to Odum. The victim wanted his gun back or $150. Odum believed that defendant had agreed to pay and that Brown was bringing defendant the money.

Detective Sergeant William Tyrrell, a firearms examiner with the State Police Crime Laboratory, testified at trial as a ballistics expert. Two bullets were recovered from the victim's body. Detective Sergeant Tyrrell concluded, based on the rifling of the bullets, that the bullets were fired by two different weapons. The diameter of the bullets indicated that the weapons were a nine millimeter, a 357, or a 38 special. There were no weapons to examine.

Detective Dale Collins interviewed defendant after his arrest. The videotaped interview was admitted at the joint trial and played for defendant's jury.[1] During the interview, defendant stated that in March or April 2008, he owned a Smith & Wesson long-nosed 38 special handgun, and that he and the victim had "done some bullshit together." Defendant asked the victim to keep his gun because he did not want it in his vehicle. When defendant asked for the gun to be returned, the victim offered an excuse for not having it. Sometime later, the victim came across a different .38-caliber gun and gave it to his brother Mark, who had apparently partnered with defendant to sell marijuana. Mark then gave the gun to defendant. A few days later, the victim asked for the gun, but defendant refused. Later, when the victim again asked for the gun, defendant asked the victim for his own gun in return.

[1] The videotape was not played for Brown's jury.

According to defendant, the victim had promised Brown[2] the gun in defendant's possession as payment for a debt. On the day of the shooting, when Brown asked defendant for the gun, defendant said the victim no longer had a gun to give. Brown called the victim. That night, defendant was outside with a group of people, and had the gun on him, when the victim drove up demanding the gun. Defendant told the victim to "chalk that up baby—tit for a tat—where mine at." The victim disagreed and demanded $150 or his gun. Defendant walked away and explained the situation to Brown. He and Brown went to the store together, and Brown suggested that defendant fight the victim. Defendant said he "don't really know how to fight for fun" and "[i]f I get into a fist fight one of us have to go." Brown then suggested that defendant hit the victim in the knees with a club or a bat to let him know that he was serious. Defendant planned to beat the victim with an old tie rod.

When defendant and Brown returned from the store, they parked further down the street. The victim approached Brown's van and again demanded money or his gun. Defendant stepped out of the van, leaving the gun inside. When the victim reached for the gun, defendant hit him with the tie rod and hit him again as he was trying to run away. The victim ran toward a vacant lot, "leaking out of his head," and his pants fell down as he was running. Defendant ran after him because he believed that the victim was going to retrieve his AK-47, and defendant began "beating this muthafucka brains in with this gun." At that point, the victim was on the ground, near the curb.

After the beating, defendant looked through the victim's pockets and took "maybe ten dollars." He then walked back to Brown's van, still holding the gun. He entered the van, and they "pulled up the street." Defendant "heard some shots fired" and then jumped out of the van. He denied shooting the victim and taking the victim's keys or car. He did not know who took the car.

At the joint trial, defendant testified on his own behalf, admitting the truth of most of his statement to the police. He admitted beating the victim, but denied shooting him or taking his car. Defendant testified that Brown shot the victim. According to defendant, after he beat the victim and entered Brown's van, Brown drove to where the victim was lying and shot him several times. Defendant jumped out of the van and ran away.

Brown testified that he did not know the victim. On the night of the shooting, defendant called him. He believed that defendant was going to ask him for money, so he drove his van to the street where defendant lived. Defendant approached the van and asked whether you are "even" with another person if the other person loses something of yours and you tell them that you lost something of theirs. Later, defendant spoke to the victim next to the van and Brown overheard the victim say that he wanted money for his "piece." Defendant then grabbed an item from the floor of the van and started chasing the victim, hitting him with the item. Defendant then shot the victim five times. Brown drove his van slowly up the street. He saw the victim on the ground and defendant running toward the van, flagging him down. Defendant got in the van. But when Brown began driving, defendant asked him to pull over to the other side of the street

[2] During the interview, defendant declined to identify Brown, referring to him as "John Doe."

and stop. Defendant then leaned across Brown, reached out the driver's window, and shot the victim five more times, holding the gun with both hands. Brown drove around the corner, stopped, and then defendant jumped out and disappeared.

Brown's jury was unable to reach a verdict, and he was later retried and acquitted. Defendant was convicted and sentenced as indicated. He now appeals as of right.

II. DEFENDANT'S STATEMENT TO THE POLICE

Defendant gave a statement to the police in which he confessed to being at the scene of the shooting, beating the victim, and taking some items from his pocket, but denied shooting the victim or taking his vehicle. The statement was videotaped and played for defendant's jury. On appeal, defendant argues that the trial court erred in denying his pretrial motion to suppress the statement on the ground that it was tainted by misleading advice concerning his right to counsel. He also argues that the statement should have been excluded because it was preceded by another interrogation, which occurred before he was advised of his *Miranda*[3] rights. Defendant preserved the former issue by raising it in a pretrial motion to suppress, but he did not raise the latter issue, leaving it unpreserved.

A. MID-INTERROGATION ADVICE OF RIGHTS

Defendant argues that his videotaped, post-*Miranda* statement should have been suppressed because the interrogating officer, Detective Collins, subjected him to another interrogation before advising him of his constitutional rights. As indicated, defendant did not raise this argument below, leaving the issue unpreserved. Unpreserved constitutional errors are forfeited unless the defendant can show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Even if this showing is made, however, reversal is unwarranted unless a miscarriage of justice would result because the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*.

Defendant relies on *Missouri v Seibert*, 542 US 600, 616-618; 124 S Ct 2601; 159 L Ed 2d 643 (2004), in which a plurality of four justices agreed that *Miranda* warnings given after a custodial interrogation commenced and the defendant made unwarned incriminating statements were ineffective; therefore, incriminating statements repeated after the defendant was advised of her rights were inadmissible at trial. Justice Kennedy filed a concurring opinion agreeing that the defendant's statements were inadmissible. *Id*. at 618-622.

In *Bucio v Sutherland*, 674 F Supp 2d 882 (SD Ohio, 2009), the United States District Court of the Southern District of Ohio summarized the Supreme Court's decisions in *Oregon v Elstad*, 470 US 298; 105 S Ct 1285; 84 L Ed 2d 222 (1985), and *Seibert*, stating:

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

In *Elstad*, . . . [t]he Supreme Court rejected the argument that Elstad's police station confession was "tainted" by his earlier admission at his home made without *Miranda* warnings because his earlier statement let the "cat out of the bag." The Supreme Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id*. at 318. The Supreme Court concluded:

> [A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

470 US at 314. In other words, "if the prewarning statement was voluntary, then the postwarning confession is admissible unless it was involuntarily made despite the *Miranda* warning." *U.S. v. Carter*, 489 F.3d 528, 534 (2d Cir. 2007).

. . . The suspect in *Seibert* was taken to the police station and questioned for thirty to forty minutes by a police officer who intentionally refrained from giving the *Miranda* warnings until the suspect confessed. The suspect was given a twenty-minute break and then advised of her *Miranda* rights. Questioning resumed using the same questions which elicited the initial confession and the suspect again confessed.

A majority of the Supreme Court in *Seibert* held the second warned statements elicited under the question-first, warn later technique to be inadmissible. A plurality of four justices held the *Miranda* warnings given pursuant to a question-first practice were ineffective in advising a suspect that he "had a real choice about giving an admissible statement at that juncture" or "could choose to stop talking even if he had talked earlier." [*Seibert*, 542 US] at 612. The plurality reasoned that when an individual has just incriminated himself by answering a series of detailed questions about his involvement in criminal activity, with little incriminating potential left unsaid, a midstream warning that instructs him of his right to refrain from answering those exact kinds of questions may fail to "reasonably convey that he could choose to stop talking." *Id*. at 612 (plurality opinion). The plurality stated:

> For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of

> interrogation as distinct from the first, unwarned and inadmissible segment.

Id. at 612. The plurality determined that "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Id*. at 613-14.

The justices looked to five factors impacting whether *Miranda* warnings delivered midstream can be effective to accomplish their objectives: (1) the completeness and detail involved in the first round of questioning; (2) the overlapping content of the statements made before and after the warning; (3) the timing and setting of the interrogation; (4) the continuity of police personnel during the interrogations; and (5) the degree to which the interrogator's questions treated the second round as continuous with the first. *Id*. at 615.[9] The *Seibert* plurality distinguished *Elstad*, explaining that the *Elstad* Court "took care to mention that the officer's initial failure to warn was an 'oversight,'" 542 US at 614, and that "on the facts of that case, the Court thought any causal connection between the first and second responses to the police was 'speculative and attenuated.'" *Id*. at 615 (citing *Elstad*, 470 U.S. at 313). The plurality noted that "a reasonable person in [Elstad's] shoes could have seen the station house questioning as a new and distinct experience" and, therefore, "the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *Id*. at 615-16.

> [9] The *Seibert* plurality noted that "[b]ecause the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work." [*Id*. at 617 n 6.]

> In contrast, the unwarned interrogation of the suspect in *Seibert*:
>
> was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. . . . It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what

> had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.

Id. at 616-17 (plurality opinion).

> Justice Kennedy, in his concurring opinion, determined that statements resulting from an intentional question-first, warn later practice must be suppressed unless curative measures are taken "to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id*. at 622. Justice Kennedy believed that in cases not involving a deliberate two-step interrogation technique, *Elstad* should control the admissibility of postwarning statements. *Id*. (Kennedy, J., concurring).

> The Sixth Circuit has not resolved the issue of whether the *Seibert* plurality or Justice Kennedy's concurrence operates as the controlling precedent. *See United States v. Pacheco-Lopez*, 531 F.3d 420, 427 n. 11 (6th Cir. 2008). [*Bucio*, 674 F Supp 2d at 922-925.]

Like the Sixth Circuit, the courts of this state have not yet determined whether the *Seibert* plurality or Justice Kennedy's concurrence controls in cases of "question-first, warn later" interrogations or "*Miranda*-in-the-middle" interrogations, as they have been termed by the Sixth Circuit. See *Pacheco-Lopez*, 531 F3d at 425. But we need not decide what test controls at this stage of the proceedings, as there are insufficient facts of record for us to determine whether defendant's statement was inadmissible under either test.

During defendant's videotaped interview with the police, both defendant and Detective Collins made statements indicating that they had previously discussed defendant's alleged involvement in the shooting.[4] It is not clear from their statements, however, when or where the prior discussion or discussions took place, what questions the detective had asked, or what

[4] Defendant stated, among other things: " . . . but like I was saying earlier my heart won't let me admit to something I didn't do;" "[y]our information is just a little twisted;" "I didn't tell you everything out there;" "[b]ecause I wasn't up front with you before, and I-and there's no excuse for it, it's just-you know;" "See earlier I made it seem like I wasn't even around,"; "[a]nd part of what I was telling you out there before you left and came back was the truth." In response to such remarks Detective Collins stated, among other things: "[f]orget about that. I don't hold no grudges, man,"; "Don't worry about that, because even then I knew; "[l]et me tell you something. I've been working here a long time, and before I advise anybody their rights they can kick it-they can talk, and I mean most of the time, man, they're bullshiting, I mean I know that. Until you feel that you need to."

specific statements defendant had made. At the joint trial, defense counsel questioned Detective Collins about his prior discussions with defendant:

> *Q.* . . . [P]revious to this video, you had some conversations with [defendant], correct?
>
> *A.* That's correct.
>
> *Q.* And those conversations are not written down or in the video tape, correct?
>
> *A.* That's correct.
>
> *Q.* And in those conversations, you went over certain things with him about the information that you had previously had, correct?
>
> *A.* That's correct.
>
> *Q.* And the information that you previously had was Mr. Odum's statement, correct?
>
> *A.* Well, I didn't go over everything I had with him that Mr. Odum said. I basically let him know who I was.
>
> *Q.* Yes.
>
> *A.* Asked him why he was here. And then, the conversation led to the homicide, and at that time, that is when the walk to the video room is taken.
>
> *Q.* Okay. So, how long is the conversation that you had before you go to the video room?
>
> *A.* Maybe about five minutes.
>
> *Q.* Okay, and you go over some points with him, correct?
>
> *A.* That's correct.
>
> *Q.* About that you know different things that had happened, correct?
>
> *A.* My conversation would have been that he was involved in a homicide, that I knew he was, and that I had an eyewitness to that homicide.
>
> *Q.* Okay.
>
> *A.* And did he have any involvement? And when he started talking about that he had some involvement, that's when I took him upstairs and gave him his Constitutional Rights.

Thus, according to Detective Collins' testimony, he only conversed with defendant for about five minutes before taking him to the video recording room. During their discussion, the detective introduced himself, indicated that he knew defendant was involved in a homicide and that he had an eyewitness, and asked defendant about his involvement in the homicide. When defendant began to respond, the detective took him to the video recording room.

Defendant, however, filed an affidavit with this Court claiming otherwise. In the affidavit, which is not included in the lower court record, defendant states that he was arrested on September 9, 2008, brought into custody, and detained overnight. The next day, Detective Collins removed him from the lock-up, took him to a cubicle, and interrogated him for approximately one-half hour, attempting to solicit information from defendant by sharing with him information implicating him in the crime. According to defendant, he was never advised of his *Miranda* rights during the first interrogation. Defendant claimed to have no personal knowledge of the incident, and Detective Collins returned him to the lock-up. Later that same afternoon, Detective Collins returned and transferred defendant from the lock-up to a cubicle. Detective Collins again attempted to solicit information from defendant by sharing with him information gathered during the investigation and informing defendant that there was enough information to charge him with first-degree pre-meditated murder, which would result in life in prison. According to defendant, he was never advised of his *Miranda* rights during the second interrogation. During the second interrogation, defendant initially denied any involvement, but then admitted that "there was an incident about a gun" before the day of the shooting and that just before the shooting, he was on the street with a group of people. When Detective Collins further prodded him, defendant said that he would tell the detective what had happened from the beginning. At that point, Detective Collins said, "Wait, let's go upstairs and finish this; and when we get there you can tell me everything." Detective Collins then took defendant to a room equipped with a video camera where a third interrogation took place and was recorded on videotape. According to defendant, it was not until this third session that Detective Collins informed him of his *Miranda* rights.

It is clear from the record that defendant engaged in one or more pre-*Miranda* discussions with Detective Collins. However, because the facts surrounding their discussions and the specific content of the discussions are not entirely clear, and defendant's affidavit is not a part of the record, a remand for an evidentiary hearing is warranted.[5] In order for us to determine

[5] The dissent states that a remand is inappropriate based, in part, on the law of the case. We acknowledge that defendant filed a motion to remand under MCR 7.211(C)(1), which this Court denied prior to oral argument, stating that defendant "failed to demonstrate that the issue should be decided initially by the trial court. MCR 7.211(C)(1)(a)(i)." *People v Mitchell*, unpublished order of the Court of Appeals, entered June 14, 2011 (Docket No. 293284). The doctrine of the law of the case "provides that an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case." *People v Herrera*, 204 Mich App 333, 340; 514 NW2d 543 (1994). This Court has explained, however, that the doctrine "is an ill-defined and amorphous creature," it "is not inflexible," and it "need not be applied to create an injustice or where a prior decision is clearly erroneous." *People v Wells*, 103 Mich App 455, 462-463; 303 NW2d 226 (1981). See also *Herrera*, 204

whether a reasonable person in defendant's position would have understood the import and effect of the *Miranda* warnings given him, the trial court must make factual findings regarding, among other things, the five factors listed by the *Seibert* plurality, i.e., "(1) the completeness and detail involved in the first round of questioning; (2) the overlapping content of the statements made before and after the warning; (3) the timing and setting of the interrogation; (4) the continuity of police personnel during the interrogations; and (5) the degree to which the interrogator's questions treated the second round as continuous with the first," *Bucio*, 674 F Supp 2d at 924, citing *Seibert*, 542 US at 615, as well as Detective Collin's intent in waiting to *Mirandize* defendant until after the first round or rounds of questioning.[6]

Mich App at 340-341, citing *Wells*, 103 Mich App at 463 (stating that "in criminal cases the law of the case doctrine does not automatically doom the defendant's arguments or automatically render them frivolous and worthy of sanctions"). This Court has also granted a remand even after a prior panel denied a motion to remand in the same case. See *People v Stapf*, 155 Mich App 491, 499 n 1; 400 NW2d 656 (1986) ("We recognize that on February 18, 1986, a panel of this Court denied defendant's motion to remand on this same basis 'for failure to persuade the Court of the necessity of a remand at this time.' We now find that remand is necessary."). Here, while this Court initially denied defendant's motion to remand for the stated reason that he "failed to demonstrate that the issue should be decided initially by the trial court" under MCR 7.211(C)(1)(a)(i), following oral argument and upon thorough review of the voluminous lower court record we conclude that a remand for fact finding is required for appellate consideration. Pursuant to MCR 7.216(A)(5), this Court "may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just" remand a "case to allow additional evidence to be taken." We are not barred from directing such a remand by the law of the case.

[6] The dissent states in footnote one: "Inexplicably, the majority concludes that we need not determine whether the plurality decision in *Seibert* controls or Justice Kennedy's concurrence controls, . . . yet ultimately directs the trial court on remand to make factual findings under the factors identified by the *Seibert* plurality . . . ." In directing the trial court, we make no determination as to whether the *Seibert* plurality or Justice Kennedy's concurrence controls, as such determination is unnecessary at this point in the proceedings; instead, we direct the trial court to make factual findings pertinent to the five-factor test articulated by the *Seibert* plurality *and* Detective Collin's intent in waiting to *Mirandize* defendant, which is a crucial factor in the test advanced by Justice Kennedy. The plurality's test would apply "in the case of both intentional and unintentional two-stage interrogations," whereas Justice Kennedy stated that he would "apply a narrower test applicable only in the infrequent case . . . in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Seibert*, 542 US at 621-622. As we have noted, Justice Kennedy concluded that "[i]f the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." *Id*. at 622. In this case, the trial court should make factual findings that will enable us to analyze this issue under both the *Seibert* plurality and Justice Kennedy's concurrence.

The dissent further states that a remand is inappropriate because the plain error rule applies to this issue. According to the dissent, if the facts surrounding an issue are not clear or are incomplete in the record, no error related to that issue can be considered plain. The dissent cites

B. MISLEADING ADVICE OF RIGHTS

Defendant further argues that his videotaped statement should have been suppressed because Detective Collins gave misleading advice concerning his right to counsel. Defendant raised this argument in a pretrial motion to suppress, preserving this issue for review on appeal. We review a trial court's factual findings at a suppression hearing for clear error. *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). "However, this Court reviews de novo a trial court's conclusions of law and ultimate decision regarding a motion to suppress evidence." *Id*. Preserved constitutional errors are not grounds for reversal if they are harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994). The beneficiary of the error must prove, and the court must determine, "beyond a reasonable doubt that there is no 'reasonable possibility that [the error] complained of might have contributed to the conviction.'" *Id*. at 406, quoting *Chapman v California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967).

Before defendant gave his videotaped statement, the detective had him read a notice of his constitutional rights. The notice stated, in part:

> 3. I have the right to have an attorney (lawyer) present before and during the time I answer any questions or make any statement.
>
> 4. If I cannot afford an attorney (lawyer), one will be appointed for me without cost by the Court prior to any questioning.
>
> 5. I can decide at any time to exercise my rights and not answer any questions or make any statement.

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no legal authority for this conclusion. Moreover, we note that under some circumstances, such as the circumstances presented here, it is necessary to ascertain all of the pertinent facts surrounding an issue—facts that are simply unclear or incomplete on appeal—in order to determine whether an error "was plain, i.e., clear or obvious." *Carines*, 460 Mich at 763-764. To conclude otherwise would be illogical. Additionally, according to the dissent, an error cannot be considered plain if the error relates to an area of law that is unsettled. Again, the dissent cites no legal authority for this conclusion. We acknowledge, however, our Supreme Court's statement that in order to be plain, an error "must be clear under current law." *People v Carter*, 462 Mich 206, 232; 612 NW2d 144 (2000), citing *United States v Olano*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). But it does not necessarily follow that because a certain aspect of an area of law is unsettled, any error pertaining to that area of law is not plain. For instance, if, based on the factual findings of the trial court on remand, this Court concludes that defendant's videotaped, post-*Miranda* statement should have been suppressed under both the *Seibert* plurality and Justice Kennedy's concurrence, as did the *Seibert* Court, then the error in the admission of the statement might be considered plain, i.e., clear under current law. See, e.g., *Pacheco-Lopez*, 531 F3d at 427 and n 11 (holding that regardless whether the *Seibert* plurality or Justice Kennedy's concurrence operates as the controlling precedent, the defendant's statement must be excluded). Accordingly, we disagree with the dissent that a remand is improper.

When Detective Collins advised defendant of his rights, the following exchange occurred:

> [*DETECTIVE COLLINS*]: Okay, Vaughn, I'm going to give you your Constitutional Rights. It's 6:50—we might as well say 7:00 p.m. Okay, lets [sic] get started. I need you to read the first Right out loud.
>
> [*DEFENDANT*]: I understand the [sic] I have the right to remain silent and that I do not have to answer any questions put to me or make any statements.
>
> [*DETECTIVE COLLINS*]: You can read the rest to yourself. Do you understand that?
>
> [*DEFENDANT*]: I ought to just read #1 again.
>
> [lengthy pause; defendant reading his rights.]
>
> [*DETECTIVE COLLINS*]: Do you understand—did you finish?
>
> [*DEFENDANT*]: Uh, I do have a question. Number 4, that's not speaking currently—right now?
>
> [*DETECTIVE COLLINS*]: Well the question speaks for itself. If I cannot afford an attorney—you probably can—one will be appointed to me without cost by the court. That means down the line.
>
> [*DEFENDANT*]: Meaning when the court . . .
>
> [*DETECTIVE COLLINS*]: Right—right—right. Did you get to the next one?

Defendant signed his initials next to each right, including number four, and signed his name to the form. He then made his statement.

Before trial, the trial court reviewed defendant's videotaped interrogation. In ruling on defendant's motion to suppress, the court stated: "I agree with [defense counsel] that there was some deception on the part of Detective Collins in terms of his response. Because the form pretty clearly says, 'Prior to any questioning.' It's a difficult factual situation." The court went on to discuss *Duckworth v Eagan*, 492 US 195; 109 S Ct 2875; 106 L Ed 2d 166 (1989), and *People v Johnson*, 90 Mich App 415; 282 NW2d 340 (1979). In light of those cases and that defendant read the notice of his rights, initialed each right, and signed the notice, the court concluded that the advice of rights was adequate and defendant's statement was admissible. The court reiterated, however, that it was "a close question" and "there was some deception on the part . . . of Officer Collins in terms of his response to the question" regarding number four.

Pursuant to *Miranda*, 384 US 436, an arrestee must be advised of his rights before a custodial interrogation. However, *Miranda* does not require a particular verbatim recitation of rights, as long as the suspect is adequately or reasonably advised of his rights. *California v*

Prysock, 453 US 355, 359-361; 101 S Ct 2806; 69 L Ed 2d 696 (1981); *Duckworth*, 492 US at 201-203. In *Duckworth*, 492 US at 198, the police read the defendant a waiver form, which stated:

> "Before we ask you any questions, you must understand your rights. . . . *You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court*. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer." [Emphasis in original.]

The *Duckworth* Court held that the warnings, in their totality, "touched all the bases required by *Miranda*" and that the phrase "if and when you go to court" did not render them invalid. *Id*. at 203-205. The Court explained that the phrase "accurately described the procedure for the appointment of counsel in Indiana. Under Indiana law, counsel is appointed at the defendant's initial appearance in court, and formal charges must be filed at or before that hearing." *Id*. at 204 (citations omitted). According to the Court, "it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask *when* he will obtain counsel. The 'if and when you go to court' advice simply anticipates that question." *Id*. The Court further explained that "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." *Id*. In *Johnson*, 90 Mich App at 420, which the trial court in this case also referenced, this Court held that police advice to the defendant that he "had the right to have an attorney present" informed him of his right to counsel during interrogation and not merely at some subsequent trial.

We agree with the trial court that this is a close call. Furthermore, while the trial court relied, at least in part, on *Duckworth* in reaching its conclusion, we find this case factually distinguishable from *Duckworth*. As the trial court held, Detective Collins' response to defendant's question about his right to counsel was deceptive. The *Duckworth* Court found no such deception. Moreover, in *Duckworth*, the statement "a lawyer . . . will be appointed for you, if you wish, if and when you go to court" was included on a waiver form couched between statements indicating that the defendant had the right to the advice and presence of a lawyer before being questioned and during questioning, and that the defendant could stop answering questions at any time to speak to a lawyer. In this case, although the notice of rights form indicated defendant's right to counsel before and during questioning and to exercise his rights at any time, defendant asked a follow-up question to which Detective Collins gave a deceptive answer. In explaining number four on the notice of rights, the detective stated that if defendant could not afford an attorney, one would be appointed for him "down the line." The detective did not reiterate that defendant had the right to counsel before and during questioning.

In *Prysock*, 453 US at 360, the Supreme Court held that that *Miranda* warnings would not be sufficient "if the reference to the right to appointed counsel was linked [to a] future point

in time after the police interrogation." The "vice referred to in *Prysock* was that such warnings would not apprise the accused of his right to have an attorney present if he chose to answer questions." *Duckworth*, 492 US at 205. In order to determine whether the warnings given defendant satisfied *Miranda*, we must examine the totality of the circumstances surrounding the interrogation, see *People v Daoud*, 462 Mich 621, 633-634; 614 NW2d 152 (2000); *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005), including defendant's interactions with the police leading up to the advice of rights. The facts surrounding those interactions must be ascertained on remand. When the trial court initially decided this issue, it did not consider defendant's previous interactions with Detective Collins, as defendant had not yet raised the issue of "*Miranda*-in-the-middle" interrogations discussed above.

III. THE BULLETS RECOVERED FROM THE VICTIM'S BODY

Defendant argues that the trial court abused its discretion in admitting the bullets allegedly recovered from the victim's body because there was an insufficient foundation for admissibility, specifically an inadequate chain of custody. Defendant further argues that he is entitled to a new trial as a result of newly discovered evidence that Sergeant Timothy Firchau, the officer who identified the bullets and testified in regard to the chain of custody at the joint trial, committed perjury.

A. CHAIN OF CUSTODY

Defendant raised the chain of custody issue before the trial court, and the court admitted the bullets into evidence over defendant's objection. We review preserved evidentiary issues for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

When physical evidence is offered as having had a direct role in the crime, an adequate foundation for admissibility requires testimony that: (1) the object offered is the object which was involved in the incident; and (2) the condition of the object is substantially unchanged. *People v White*, 208 Mich App 126, 129-130; 527 NW2d 34 (1994). If the object possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the object is composed is relatively impervious to change, the court has broad discretion to admit it on the basis of testimony that the object is the one in question and is in a substantially unchanged condition. *Id*. at 130. Conversely, when the object is not readily identifiable or is susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion might require a substantially more elaborate foundation. *Id*. Such a foundation will commonly entail tracing the object's chain of custody with "sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with." *Id*.

Consistent with these requirements, this Court has concluded that "the admission of real evidence does not require a perfect chain of custody." *Id*. Rather, "any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims." *Id*. These rules apply even to "the admission of relatively indistinguishable evidence" rather than being limited to objects that are "fairly unique or readily identifiable." *Id*. at 131. In light of these principles, this Court in *White* stated:

> [W]e hold that a perfect chain of custody is not required for the admission of cocaine and other relatively indistinguishable items of real evidence. Rather, such evidence may be admitted where the absence of a mistaken exchange, contamination or tampering has been established to a reasonable degree of certainty.
>
> Although we recognize that a break or gap in the chain of custody may be relevant to this determination, nevertheless, it does not require automatic exclusion of the evidence. The threshold question remains whether an adequate foundation for admission of the evidence has been laid under all the facts and circumstances of the individual case. Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility. [*Id*. at 132-133.]

Here, the medical examiner testified that two bullets were recovered from the victim's body. Sergeant Firchau testified that he was the officer-in-charge of the scene and attended the victim's autopsy on June 21, 2008. He testified that "once the bullets were removed from the complainant, they were given to an investigator, logged into the system, and then, turned over to me," pursuant to usual procedure. Sergeant Firchau took the bullets to the homicide section of the Detroit Police Department. They were then turned over to the property officer, Officer Ricardo Villarreuel. At the joint trial, Sergeant Firchau opened the evidence bags and testified that the bullets inside were the same bullets depicted in photographs taken during the autopsy. Detective Collins testified that he became the officer-in-charge the day after the shooting. According to Detective Collins, Sergeant Firchau brought him the bullets from the morgue. The detective then gave the bullets to Officer Villarreuel with a request for laboratory services. Officer Villarreuel testified that he received the bullets from either Sergeant Firchau or Detective Collins.

Officer Villarreuel processed the bullets, logged them into the Detroit Police Department's system on June 25, 2008, and the next day took them to the Detroit Police Department Crime Laboratory. When asked why there were four days between the autopsy and the bullets being logged into the system, Officer Villarreuel testified that he was most likely not working on those days and that either Sergeant Firchau or Detective Collins would have kept the bullets in their possession until turning them over to him. Officer Matthew Bryant of the Detroit Police Department Crime Laboratory received the bullets from Officer Villarreuel on June 26, 2008, and the evidence was then stored in a safe. Officer Stephen Sokol testified that he probably later transported the bullets to the State Police Crime Laboratory in Sterling Heights, but he needed more documentation to be certain. The parties stipulated that the bullets were received by the Sterling Heights Laboratory on July 7, 2008. Detective Sergeant William Tyrrell of the State Police Grayling Laboratory received the bullets from the Sterling Heights Laboratory, which is the intake point for all evidence from the Detroit Police Department. The bullets were in a sealed envelope with tags from the Detroit Police Department and arrived with a short report indicating that the bullets came from the morgue.

We agree with the trial court that the prosecution traced the chain of evidence with sufficient completeness to show, with a reasonable degree of certainty, that the bullets were those

removed from the victim's body during the autopsy and that they had not been mistakenly exchanged, contaminated, or tampered with. Any weaknesses in the chain of custody affected only the weight of the evidence and did not preclude its admissibility. The trial court did not abuse its discretion in finding that a sufficient foundation had been established to admit the bullets into evidence.

B. NEWLY DISCOVERED EVIDENCE

Defendant next argues that at Brown's second trial, Sergeant Firchau testified that he was not present at the victim's autopsy. According to defendant, this constitutes newly discovered evidence that the sergeant committed perjury at the joint trial, thereby entitling defendant to a new trial. Defendant did not raise this issue in a motion for a new trial before the trial court, leaving the issue unpreserved. See *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). Therefore, defendant must establish plain error affecting his substantial rights. See *Carines*, 460 Mich at 763-764.

To be entitled to a new trial on the basis of newly discovered evidence, a defendant must show that: (1) the evidence, not merely its materiality, was newly discovered; (2) the new evidence is not cumulative; (3) the defendant could not have, by the use of reasonable diligence, discovered and produced the evidence at trial; and (4) the new evidence would make a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). Evidence of perjury can be grounds for a new trial. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). In determining whether newly discovered evidence warrants a new trial, a reviewing court may exercise its discretion and evaluate the credibility of the evidence. See *Cress*, 468 Mich at 692.

At the joint trial, Sergeant Firchau unequivocally testified that he attended the victim's autopsy and took possession of the bullets. At Brown's second trial, however, Sergeant Firchau testified that he was the officer in charge of the scene, but did not attend the victim's autopsy. The medical examiner testified that two bullets were recovered from the victim's body, and Brown's counsel stipulated to the chain of custody. Detective Sergeant Tyrrell testified, as he did at the joint trial, that the two bullets were fired by two different guns.

On appeal, the prosecution acknowledges that there is a discrepancy between Sergeant Firchau's testimony at the two trials. However, the prosecution points to additional, not-of-record evidence indicating that the sergeant did, in fact, attend the victim's autopsy and take possession of the bullets. The medical examiner's sign-in sheet from the day of the autopsy does not list Sergeant Firchau. But the medical examiner's property log shows that the sergeant signed for the bullets and that the medical examiner's investigator transferred the bullets to him on the day of the autopsy. An evidence transfer receipt shows the same. Sergeant Firchau's activity log and a protocol request also indicate that he was present at the morgue and attended the autopsy. Such evidence suggests that the sergeant did attend the autopsy and take possession of the bullets and that he testified incorrectly at Brown's second trial, in which the chain of custody was not at issue.

To be entitled to a new trial on the basis of newly discovered evidence, defendant must show that the new evidence would make a different result probable on retrial. See *Cress*, 468 Mich at 692. If defendant could establish that Sergeant Firchau gave false testimony at the joint trial, it would undermine the bullets' chain of custody as presented by the prosecution. The bullets were significant to the prosecution's case given Detective Sergeant Tyrrell's testimony that the bullets were fired by two different guns. The prosecution used this evidence to argue that both defendant and Brown may have shot the victim. Given the significance of the two bullets and that both parties rely on evidence that is not of record in arguing this issue, a remand for an evidentiary hearing is warranted on this issue as well.[7] The trial court must make factual findings regarding Sergeant Firchau's testimony at Brown's second trial and any other evidence pertinent to the sergeant's presence at the victim's autopsy and possession of the bullets recovered from the victim's body.

We decline to address the additional issues raised by defendant at this time.

We remand for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

[7] Defendant raised this issue in his motion to remand, which this Court denied.

Court of Appeals, State of Michigan

ORDER

People of MI v Vaughn Mitchell

Docket No. 293284

LC No. 08-013700-FC

E. Thomas Fitzgerald
Presiding Judge

David H. Sawyer

Jane M. Beckering
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 35 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded.

As stated in the accompanying opinion, the trial court shall conduct an evidentiary hearing and make factual findings on the record regarding defendant's interaction with the police and the totality of circumstances surrounding the police's interrogation of defendant, which includes a determination of the following: (1) the completeness and detail involved in the rounds of questioning that occurred before defendant received his *Miranda* rights; (2) the overlapping content of defendant's statements made before and after defendant received his *Miranda* rights; (3) the timing and setting of the interrogations; (4) the continuity of police personnel during the interrogations; (5) the degree to which Detective Collins's questions treated subsequent rounds of questioning as continuous with prior rounds of questioning; and (6) Collins's intent in waiting to advise defendant of his *Miranda* rights until after one or more rounds of questioning. The trial court must also make factual findings regarding Sergeant Firchau's presence at the victim's autopsy, Firchau's possession of the bullets recovered from the victim's body, and Firchau's testimony at Vaughn Brown's second trial. The proceedings on remand are limited to these issues.

The parties shall promptly file with this Court a copy of all papers filed on remand. The trial court shall complete the proceedings within 112 days after the issuance of this order. Appellant shall file with this Court copies of all orders entered on remand within seven days of their entry. The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

Sawyer, J., would not remand for the reasons stated in his dissenting opinion.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

OCT 25 2011
Date

Chief Clerk